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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

Like Virginia, California has enacted a cross-burning statute, proscribing what California considers to be a form of "terrorism."[1] And, like Virginia, California seeks to ensure that its statute be found by this Court to be permissible – without offense to the First Amendment. California also concurs with Virginia that, insofar as these statutes proscribe only conduct that is threatening, the statutes should be deemed to be content-neutral, rather than content-based. They should, therefore, be found to lie outside the concern expressed in this Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992).

But California's statute, by its terms, is narrower than is Virginia's statute. California's statute prohibits only *trespassory* cross-burning for an intimidating purpose, *i.e.*, on the property of another, without the authorization of

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[1] California's "cross-burning" statute is expressly treated as a form of *terrorism*:

> Any person who burns or desecrates a cross or other religious symbol . . . on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that property, or who burns, desecrates, or destroys a cross or other religious symbol . . . on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends or works at the school or who is otherwise associated with the school, shall be punished . . . .

Cal. Pen. Code § 11411(c). "Terrorizing" is defined as "caus[ing] a person of ordinary emotions and sensibilities to fear for personal safety." § 11411(d).

the occupant, and for the purpose of intimidating that occupant. Cal. Pen. Code § 11411(c). California therefore submits this brief to ensure that, in analyzing the issue presented, the Court is aware of the different approaches that the States take in the treatment of this evil.

SUMMARY OF ARGUMENT

California joins Virginia in urging that this Court recognize the special injury that is inflicted by cross-burning. Like an anonymous threatening phone call at 2:00 a.m., the unwelcome burning of a cross, or any religious symbol on the property of another, carries with it a particular credibility and fearsomeness as a threat of violence. Furthermore, trespassory cross-burning, as prohibited by California and other states,[2] is both anonymous and particularly brazen, revealing that the perpetrator respects no boundaries. Cross-burning is inherently dangerous. It manifests a willingness to risk the spread of fire from the cross to other property – a yard, a residence – in order to bring home the intensity of its threatening message.

Cross-burnings strike fear, not only in their particular victims, but in the surrounding neighborhoods. Cross-burnings breed distrust and can thereby break down the delicate social fabric of a community – particularly the

[2] An element of the California statute is that the cross-burning must be "without authorization," Cal. Pen. Code § 11411(c), which has been construed to mean the authorization of the victim-occupant. *People v. Carr*, 81 Cal.App.4th 837, 842-43, 97 Cal.Rptr.2d 143 (2000).

important and delicate balance of trust in communities of diverse racial, ethnic, and religious makeup. Cross-burnings cannot realistically be addressed as ordinary malicious mischief; in recognition of the especially insidious nature of cross-burnings, that conduct must be addressed specially. California and other states have chosen to do so.

California, like Virginia, proscribes a mode of communication, in this case, the making of a threat of personal injury by means of burning a cross or other religious symbol. The intended message of the perpetrator is utterly immaterial. What matters is only that the conduct was accomplished for the purpose of intimidation or, in California, terrorizing. Accordingly, as a content-neutral regulation of clearly proscribable expression, the Virginia statute does not implicate the "strict scrutiny" analysis articulated by this Court in *R.A.V.*

But even if the Virginia statute were deemed to be "content-based," it would be permissible under *R.A.V.*, because violation of the statute requires proof of intent to intimidate. Therefore, "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Furthermore, the statute falls within two permissible bases recognized by this Court for regulation of proscribable speech: First, only that cross-burning is proscribed that engenders fear of personal injury, and that is the very reason why threatening speech is proscribable at all. See *id.* at 388. Second, proscription of cross-burning is justified by Virginia, as by California, because of the "secondary

effect" of intimidation – without regard to the particular content of the intended message. *Id.* at 389.[3]

ARGUMENT

A. VIRGINIA'S CROSS-BURNING STATUTE IS CONSTITUTIONAL AS A CONTENT-NEUTRAL REGULATION OF PROSCRIBABLE CONDUCT

1. Cross-burning statutes like California's and Virginia's are focused, not on any particular message intended by the perpetrator, but on the particularly pernicious mode in which that message – whatever it is – is communicated, *viz.*, "in a threatening (as opposed to a merely obnoxious) manner," see *R.A.V.*, 505 U.S. at 393, by means of burning a religious symbol. *Threatening* expressive conduct, like "fighting words," is analogous to a noisy sound truck. "Each is . . . a 'mode of speech' . . . ; both can

[3] Some courts speak of three exceptions articulated in *R.A.V* to the general prohibition against content-based discrimination within proscribable speech. See, e.g., *In re Steven S.*, 25 Cal.App.4th 598, 31 Cal.Rptr.2d 644 (1994). Amicus, however, reads *R.A.V.* as articulating a general justification for content-based discrimination within a class of proscribable speech – "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot," *R.A.V.*, 505 U.S. at 390 – and providing two examples of such a justification, *viz.*, that "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable," *id.* at 388, and that the content-based subclass of proscribable speech is "associated with particular 'secondary effects' of the speech, so that the regulation is *'justified* without reference to the content of the . . . speech.'" *Id.* at 389 (alteration in original) (citations omitted).

be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment." *R.A.V.*, 505 U.S. at 386 (citation omitted).

The deliberate burning of religious symbols on the property of another communicates a simple message – a threat to personal safety. To be sure, a more specific message might be *inferred*, on a case-by-case basis, from the characteristic or trait of the victim of the intimidation, but the statute draws no such distinctions. The proscription at issue here applies to malicious and trespassory burning of a religious symbol, whatever may be the intended message: whether it is a threat based on the race of the victims; the religious beliefs of the victims (e.g., Muslim); the nationality of the victims (e.g., Palestinian); the sexual orientation of the victims; the profession of the victim (e.g., a doctor who performs abortions); or, indeed, any other basis for which, under the circumstances, a burning religious symbol might reasonably be understood by the victim as a threat to personal safety. Under statutes like Virginia's and California's, it matters only that the perpetrator burns the cross (or other religious symbol) for the purpose of intimidating those persons who are the objects of the message. Furthermore, the burning of a religious symbol for *any* purpose *other* than intimidation is not proscribed by either statute.

2. Cross-burning statutes like Virginia's and California's, therefore, should be treated as content-neutral and exempt from the strict-scrutiny analysis articulated in *R.A.V.* Indeed, the Court in *R.A.V.* expressly acknowledged that "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable

(and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 393. The Court noted that, "St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance." *Id.* at 393-94.

Unlike St. Paul, California and Virginia have singled out "an especially offensive mode of expression," *viz.*, *terrorizing* or *intimidation* by use of a burning of a religious symbol, without regard to the intended message of the perpetrator. This Court has previously recognized that a true threat to personal safety enjoys no constitutional protection. *Watts v. United States*, 394 U.S. 705 (1969); see also, *R.A.V.*, 505 U.S. at 388 ("[T]he reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President."). The proscription against cross-burning in the California and Virginia statutes is "on the basis of a noncontent element," *id.* at 386, *viz.*, *intimidation* and, in California, *trespassory terrorizing*. As a facially content-neutral regulation of conduct, the statutes are not subject to the strict scrutiny mandated by the Court in *R.A.V.*

B. EVEN IF VIRGINIA'S CROSS-BURNING STATUTE WERE DEEMED TO BE CONTENT-BASED, IT WOULD BE PERMISSIBLE BECAUSE THERE IS NO REALISTIC POSSIBILITY THAT OFFICIAL SUPPRESSION OF IDEAS IS AFOOT

1. The Virginia Supreme Court incorrectly treated Virginia's cross-burning statute as content-based because of the original motivation behind enactment of the statute. *Black v. Commonwealth*, 262 Va. 764, 774, 553 S.E.2d 738 (2001) ("While not specifically stating that 'race, color, creed, religion, or gender' is the subject of proscription, the absence of such language does not mask the motivating purpose behind the statutory prohibition of cross burning."). But nothing in *R.A.V.* suggests that courts should look behind the facial neutrality of a cross-burning statute. In this regard, the state court's reliance on *United States v. Eichman*, 496 U.S. 310 (1990), see *Black v. Commonwealth*, 262 Va. at 775, is inapposite. In *Eichman*, the Court looked behind the facial neutrality of the statute in order to safeguard the expression of *permissible* expressive conduct, *viz.*, expressive burning of the flag. In this case, however, true threats of personal injury – no matter how delivered – should never enjoy constitutional protection. *Watts v. United States*, 394 U.S. 705; cf., *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."). Since the cross-burning statute facially proscribes a class of threats based only on the *mode* of delivery, and not on its content, no legitimate free-speech interest is served by considering

whether the legislature might originally have passed the statute to address a then-common pattern of threats based on race.[4]

2. Even if the statutes were deemed to be content-based, they clearly come within the permissible justifications recognized by this Court for content-based regulation of otherwise proscribable speech. Although the Court discussed three possible justifications for such regulation, the Court acknowledged that others were possible. "Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Amicus respectfully submits that, inasmuch as both the California and the Virginia statutes, by their very terms, proscribe only

[4] A California intermediate appellate court has also treated California's statute as amounting to content-based discrimination, not because of the legislature's original intent, but because of the historic origins of cross-burning. *In re Steven S.*, 25 Cal.App.4th at 606 ("Cross burning conveys a message – the Ku Klux Klan's creed of racial hatred. As such, it implicates the First Amendment's guarantee of freedom of speech (footnote omitted)"); see also *id.* at 612-613 (statute is permissible under *R.A.V.*, "although section 11411, subdivision (c), discriminates against malicious cross-burning on the basis of content"). The appellate court upheld the California statute as coming within the justifications recognized by the Court in *R.A.V.* Nevertheless, California respectfully submits that the appellate court erred in its conclusion about the statute's content neutrality. The Ku Klux Klan message of racial hatred referenced by the court is not always the message communicated by a cross-burning, and *on its face*, section 11411(c) prohibits the activity, whether or not the message is race-based, religion-based, or otherwise.

cross-burning that is for the purpose of intimidation or terrorizing – and, in California – only if the cross-burning is by means of a trespass onto the victim's property – there is "no realistic possibility that official suppression of ideas is afoot."

3. Indeed, the California and Virginia statutes fit within the two examples of permissible justifications that this Court recognized. First, to the extent that these statutes might be deemed to be content-based because of some *implicit* message of category-based intolerance that is communicated by the burning of a religious symbol, "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." See *R.A.V.*, 505 U.S. at 388. The California Legislature has made clear that the purpose of proscribing cross-burning is the protection of every person, "regardless of race, color, creed, religion, gender, or national origin," to be secure from fear and intimidation. Cal. Pen. Code § 11410. These are the very reasons why threats of personal injury are proscribable at all. See *R.A.V.*, 505 U.S. at 388 (recognizing that threats of violence are "outside the First Amendment"). And second, as has been repeatedly emphasized, the target of these cross-burning statutes is not the message, but the "secondary effect" of *intimidation* and, in California's case, *trespassory terrorizing*. See *In re Steven S.*, 25 Cal.App.4th at 612; Cal. Pen. Code § 11410. As this Court recognized, content-based discrimination against a subclass is permissible when the subclass "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is *'justified* without reference to the content of the . . . speech.'" *R.A.V.*, 505 U.S. at 389 (alteration in original) (citations omitted).

4. There is no dispute here that state justification for the cross-burning statute is compelling. St. Paul justified its cross-burning statute as "help[ing] to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." *Id.* at 395. This Court acknowledged that these interests are compelling. *Id.* But, by enacting a content-neutral cross-burning statute, Virginia, like California, has chosen to extend its concern to secure the right to a peaceful existence beyond historically discriminated groups, to all who might reasonably be intimidated and terrorized by similarly expressed threats of violence. This Court has recognized that, "'[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (citation omitted) (upholding ordinance restricting residential picketing).

CONCLUSION

For the reasons stated, Amicus Curiae State of California respectfully urges the Court to reverse the judgment of the Supreme Court of Virginia and uphold Virginia Code § 18.2-423 as a permissible regulation of conduct, consistent with the First Amendment.

Respectfully submitted,

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